U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 October 2006

CASE NO. 2006-LDA-00024

OWCP NO. 02-138673

In the Matter of:

J.M.,
Claimant,

v.

PROCUREMENT SERVICES ASSOCIATES,
Employer.[1]

Appearances: J.M., appearing pro se

David C. Nolan, Esq., and Daniel R. Lord, Esq.
For Employer

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for compensation brought under the Defense Base Act, 42 U.S.C. § 1651, an extension of the Longshore and Harbor Worker's Compensation Act, as amended ("the Act"). 33 U.S.C. § 901 *et seq*. The Act provides compensation to certain employees engaged in U.S. Department of Defense related employment for occupational diseases and work-related injuries resulting in disability regardless of fault. *Id.*

On September 23, 2004, Claimant sustained injuries in a high-speed motor vehicle accident while working in Kuwait. He brought this claim against his employer, Procurement Services Associates ("Employer").

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing on November 21, 2005. Pursuant thereto, Notice of Hearing was issued on May 24, 2006, scheduling a formal hearing. On July 5, 2006 the undersigned convened the formal hearing in Phoenix, Arizona. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were admitted into evidence: Administrative Law Judge Exhibits ("AX") 1 through 3; Claimant's Exhibits

[1] Employer failed to procure worker's compensation insurance as required under the Defense Base Act. TR at 61, 107, 108, 192, 198, 215-16, 248-50, 256-60. Failure to procure such coverage can result in criminal liability for the corporation in question and its corporate officers. 33 U.S.C. § 938(a); *J.T. v. American Logistics Services*, 2006-LDA-18 at 2-3 (ALJ) (August 31, 2006). The decision as to whether to refer the matter to formal investigation will be left to the discretion of the District Director.

("CX") 1 through 16; and Employer's Exhibits ("EX") 1 through 26.[2] Claimant, appearing pro se, testified on his own behalf. The president of Employer, Dan Plute, testified on Employer's behalf.

Both parties submitted post-hearing briefs. Based upon the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Decision and Order.

STIPULATIONS

At the hearing (Hearing Transcript, hereinafter "TR", 27), the parties stipulated to the following:

1. Claimant sustained injuries in a motor vehicle accident on September 23, 2004.
2. The Defense Base Act applies.
3. There was an employer/employee relationship at the time of the accident between Employer and Claimant.
4. The injuries that arose from the accident occurred in the course and scope of employment.
5. The claim was timely noticed and filed.
6. As a result of the accident, Claimant was entitled to compensation and medical benefits.
7. Compensation has been paid from the date of the injury through and including February 28, 2005.

ISSUES

1. Causation
2. Nature and extent of disability
3. Average weekly wage
4. Outstanding medical bills
5. Interest and penalties, if any

TR at 11, 33, 34, 39-40, 68-70, 189.

[2] On August 25, 2006, Employer submitted the affadavit of Christine Valenzuela with accompanying documents, which is admitted into evidence as EX-26.

FINDINGS OF FACT

Background

Employer hired Claimant, a 55-year old man, to work in Kuwait for four months beginning in August 2004 as a purchasing manager. Claimant's duties under contract included procurement and/or contract administration, as directed by Employer's client, Perini Corporation. TR at 82, 86; EX 10 at 1.

Claimant previously worked as a purchasing manager in the U.S. for approximately thirty years, and subsequently in Iraq and Kuwait from October 2001 until the date of the accident. TR at 65-66. He testified that he experienced no injuries or illnesses during his overseas employment prior to the accident. *Id.* at 86. However, he was previously treated for a non-work related condition. In 1991 and 1992, Claimant received two surgeries for a cervical spine condition at the C5-6 level. TR at 173; CX 8 at 3; EX 25A at 1; EX 25B at 3. He testified that these surgeries fully alleviated neck pain as well as pain and numbness in the right upper extremity. TR at 175. Claimant reported these symptoms returned after the accident in Kuwait, particularly numbing and tingling in his right hand. *Id.* at 166, 172, 177; CX 8 at 3-4; EX 25A at 1; EX 25B at 2.

Employer did not require Claimant to submit to a pre-employment physical. TR at 83. He did receive a physical on March 17, 2004 in order to obtain clearance from the U.S. Department of the Army to work in Iraq and Kuwait. *Id.* at 83, 85-86; CX 16 at 21, 22, 27. According to Claimant testimony and notes from the physical exam, Claimant had no medical concerns other than high cholesterol, for which he received medication. TR at 83; CX 16 at 27. This clearance remained valid during his work for Employer, which began on or around August 1, 2004, upon Claimant's arrival in Kuwait, and ended on the date of the motor vehicle accident. TR at 82, 83.

The accident, a high-speed crash, occurred during the daylight hours of September 23, 2004 at approximately 7:00 p.m. *Id.* at 90. Claimant was driving an SUV furnished to him by Perini Corporation. *Id.* at 89. The vehicle was moving at approximately 120 kilometers per hour on a freeway when another vehicle hit it from behind. *Id.* at 89-90. Claimant's vehicle collided head-on with the wall abutting the freeway; he was restrained by his seatbelt and an airbag but sustained serious injuries. *Id.* at 90-91. Emergency services transported him to a Kuwaiti government hospital where he was treated for various cuts and contusions on his forehead, left hand, knees, ribs, and quadriceps, and for fractures of the right wrist and left ankle. *Id.* at 91-96; CX 1; EX 1. Employer's president, Dan Plute, received notification that same day that the accident occurred and that Claimant's injuries required emergency treatment. TR at 241.

Claimant received casts for the fractures, and stitches to the right knee, the forehead and the left hand. *Id.* at 93-95, 132. For an unknown period of time following the accident, Claimant was unconscious. EX 25B at 5, 7. When he regained consciousness, he phoned contacts at Perini Corporation, who arranged for a transfer to a private hospital, New Mowasat Hospital. CX 1; CX 8 at 2; TR at 92, 96. The transfer occurred on September 26, 2004. CX 1; TR at 93. He recalled that at New Mowasat he received antibiotics and new casts for the fractures to the left ankle and right wrist. *Id.* at 96; CX 8 at 2.

Claimant was discharged from New Mowasat Hospital sometime on or around September 30, 2004. TR at 98. He flew home to the United States, changing flights several times. *Id.* at 97-98. An employee of Perini Corporation, Anthony Coleman, accompanied Claimant whose injuries made mobility difficult. *Id.* at 97. No one accompanied him, however, for the flights from Boston, his initial arrival point in the U.S., to Phoenix, where he resides. *Id.* at 98-99. Claimant stated that Employer had promised to do this, and promised to cover all medical expenses from the accident, but did not do so. *Id.*

at 98-99, 108. Employer's president, Dan Plute, testified that payment of claims has been problematic due to Claimant's failure to provide adequate claims information. *Id.* at 260.

Upon arrival in Phoenix, Claimant was treated at Banner Good Samaritan and Banner Thunderbird Hospitals, where physicians placed his right thumb in a spica cast, his right arm in a splint, and split the left leg cast to alleviate pain and pressure. *Id.* at 100, 125; CX 8 at 2. His physicians also ordered further tests, which included: x-rays and MRI of the right wrist and left ankle (TR 101-03, CX at 8 at 2, 5); a CT scan of the brain (EX 25B at 5); and an ultrasound that ruled out Deep Vein Thrombosis (CX 8 at 2; TR at 102). Banner Thunderbird Hospital admitted Claimant to inpatient treatment from October 3 to 7, 2004. EX 26-I. He then returned home but found it difficult to care for himself due to his injuries. TR at 122. He was admitted to a rehabilitation facility, Life Care Center, from October 7 to October 31, 2004. *Id.*; EX 26-T. He testified that he left the facility prior to the planned discharge date due to lack of funds to pay for treatment. TR at 123. Employer did not pay for the care and instead referred Claimant to the California State Compensation Insurance Fund ("SCIF") through whom Employer's insurance broker had obtained compensation insurance coverage. *Id.* at 126, 243-44. However, SCIF rescinded its pre-authorization of payment for the stay at Life Care Center, because Claimant's injuries arose from an overseas employment contract and SCIF apparently does not cover accidents occurring out of the country.[3] *Id.* at 124, 244; CX 16 at 5. Claimant testified that he was forced to apply for Medicare when SCIF refused coverage for his accident and Employer failed to provide any assistance in obtaining or paying for medical care.[4] TR 107-08, 111-12, 126, 149-52, 156. Claimant testified that Employer promised to pay for the treatment of his injuries but instead failed to pay claims and merely phoned to SCIF to try to get SCIF to pay the claims. *Id.* at 126, 151-52. Employer's president, Dan Plute, denied that Claimant requested medical care but admitted he was aware of the accident, aware that Claimant needed medical treatment and made no arrangements for any of Claimant's medical care. *Id.* at 262-63, 267, 269-70.

Claimant testified that after leaving Life Care Center, he continued to experience symptoms that made it difficult to move and to function. He first utilized a walker. However, due to problems with using the walker due to his arm being in a splint, he switched to using a wheelchair. TR at 109, 127-28; CX 14 at 8, 22. Life Care center removed his casts. TR at 109. Both legs were placed in orthopedic walking casts (boots). *Id.* at 125. He was to receive a soft cast for the right wrist, but according to Claimant the soft cast was unavailable and so instead he received a thumb stabilizer and a splint. *Id.* at 109, 127-28. Claimant recalled that his primary care physician at the time stated both ankles were broken, though no other evidence indicates this. *Id.* at 125, 130. In October 2004, Claimant reported experiencing problems with his memory to his primary care physician who was Dr. Michael Kleven at that time. Dr. Kleven referred him to Dr. Michael Epstein for short-term memory concerns. *Id.* at 134-37. Dr. Epstein saw Claimant on November 4, 2004 and stated the car accident had caused a concussion and a moderate loss of consciousness. EX 25B at 5, 7; CX 14 at 47.

[3] Claimant also secured insurance coverage through his previous employer's COBRA plan, the premiums of which he claims Employer promised to pay half and never did; when the plan did not pay claims pertaining to injuries sustained in Claimant's overseas employment, Claimant cancelled the coverage. TR at 145-48; CX 16 at 1, 2, 39.

[4] Although Employer contends that it recognizes its liability for Claimant's medical treatment and stands ready to pay (TR 196, 259-60), Employer's actions herein, or more accurately, its inaction appears aimed at avoidance of its responsibility under the Act. For example, Employer concedes liability for medical claims in the amount of $5,362.69 but as of the date of close of evidence had paid only $457.15. TR at 61, 107, 108, 192, 198, 215-16, 248-50, 256-60; EX 26-D, E, F, G, K, N, O, S, U, W. The fact that Employer has paid almost none of Claimant's medical treatment belies its stated willingness to bear its responsibilities herein. Clearly, Employer's "lip service" in acknowledging its responsibility for Claimant's medical treatment while evading Claimant's requests for medical treatment and authorization for treatment forced the Claimant to seek treatment through Medicare.

According to Claimant, the difficulties with his neck and right upper extremity are among the most impairing and began shortly after the accident. TR at 172, 177-78, 189-90. Several weeks after the accident, Claimant reported neck pain to Dr. Kleven who diagnosed chronic neck pain status post cervical fusion, and prescribed a therapeutic water pillow on November 4, 2004. CX 14 at 11; CX 16 at 3. In December 2004, Dr. Kleven referred Claimant to an orthopedist, Dr. Mark Zachary, for pain and mobility problems in the left ankle as well as for stiffness and mobility problems in the right wrist, hand and fingers. EX 24A at 1. Dr. Zachary referred Claimant to physical therapy, and continued to see him over a period of four months from December 2004 to April 2005. *Id.* at 1-2. During that period, Claimant's symptoms reduced, which Dr. Zachary attributed to physical therapy. *Id.* at 5. On April 5, 2005, Dr. Zachary wrote in his progress notes that Claimant appeared ready to return to work but noted the symptoms could recur with increased use of the symptomatic areas. *Id.* Claimant was to continue physical therapy. EX M1 at 2-3. He was to follow up with Dr. Zachary as needed. EX 24A at 5. However, Medicare discontinued these providers from its plan, so Claimant discontinued treatment. TR at 155-56; EX 24A at 5; EX M1 at 2-3.

Medicare subsequently assigned Claimant a new primary care physician, Dr. Mohammad Jamil. According to Claimant, he discussed his history with Dr. Jamil and stated the problems had continued with his left ankle, neck and right upper extremity, particularly problems moving his right wrist and difficulty gripping with his right hand, as well as numbness and tingling that had emerged immediately after the accident in the first three fingers of his right hand. TR at 172, 176, 181, 182. Dr. Jamil referred Claimant to Dr. Sepein Chiang to rule out post-traumatic carpal tunnel syndrome as the cause of the numbness. *Id.* at 166-67, 177; CX 8 at 2,3. Dr. Chiang saw Claimant on October 11, 2005, and on November 9, 2005. EX 26-M. He recommended an electromyogram ("EMG") as well as nerve conduction studies, which Dr. Avinash Khatter completed on November 1, 2005. CX 10 at 1-2. No carpal tunnel diagnosis was made, but Dr. Khatter noted mild median neuropathy was likely in the right forearm (pronator teres syndrome, i.e., nerve compression). *Id.*

Dr. Jamil then referred Claimant for an MRI of the cervical spine. On January 23, 2006, Dr. Robert Ortega completed the MRI and report. CX 13 at 1. Dr. Robert Ortega diagnosed Claimant with status post cervical fusion at the C5-6 level, significant degenerative disk disease throughout the cervical spine with associated stenoses, particularly at the C6-7 level, and noted a history of radiculopathy on the right side. *Id.*

At that point, Claimant lost his medical coverage altogether when Medicare cancelled it in January 2006. TR 186-88. It was reinstated in June 2006. *Id.* at 186. As of the time of the hearing, Medicare had assigned Claimant a new primary care physician, Dr. Julie Best, who per Claimant was in the process of arranging referrals to specialists. *Id.* at 183, 186-90. Claimant, who is right-handed, reports he continues to experience the following symptoms that emerged after the accident: pain in the left ankle, difficulty bearing weight on that ankle, and difficulty ascending stairs; pain and crepitation in the neck; numbness in the right thumb, index, and third fingers; pain at the base of the right thumb; difficulty moving his right wrist; headaches, dizziness and memory problems; and more recently, increased neck pain, increased weakness in the grip of the right hand, and numbness in the right hand in all five digits as well as mild numbness on the back of the right hand. *Id.* at 125, 172, 176-78, 294; CX 8 at 3-4; CX 16 at 3; EX 24A at 1, 2, 4; EX 25B at 2-4. At the hearing, he testified that he cannot walk or move his right wrist without medication. TR at 172.

Claimant testified that he has not worked since the accident, but has been applying to overseas contract procurement positions. *Id.* at 212-13, 229-34. He explained that the application process for these positions is lengthy, and that ideally by the time he might receive a job offer, his symptoms will have reduced to the point where he can accept the position. *Id.* at 229.

Summary of Medical Examinations

Claimant submitted into evidence a report from a medical assessment that his former attorney arranged with Dr. Steven Kassman in September 2005. CX 8. After the hearing, Employer arranged for two Independent Medical Examinations ("IME") in August 2006 with Dr. Glenn R. Bair and Dr. J. Michael Powers. EX 25A, 25B.

Dr. Kassman

Claimant was seen for a medical evaluation by Dr. Kassman, an orthopedist, on September 15, 2005. Dr. Kassman declined to state a diagnosis because of incomplete medical records and because further testing was needed.[5] CX 8 at 5. He noted that Claimant received two cervical operations at the C5-6 level in 1990 and 1991. *Id.* at 3. The first surgery was a decompression and the second a fusion, the latter of which completely alleviated numbness that Claimant had been experiencing in his right arm. *Id.* Claimant reported he experienced no numbness in the right upper extremity for a span of thirteen years, from the time of the second surgery in 1991 until after the motor vehicle accident on September 23, 2004. *Id.*

Left ankle

Dr. Kassman noted Claimant inverted his left ankle when walking, and leaned on one side of his left foot while standing. *Id.* at 3. Claimant explained that the pain in his left ankle required him to do so. *Id*. Dr. Kassman reviewed an MRI and x-rays of the left ankle and found one if not two occult fractures. *Id.* at 5. He explained that because of the occult status he could not determine whether the bone had fully healed. *Id.* at 6. He recommended repeat radiographs, followed by another MRI if needed, to verify whether full healing of the fracture(s) had occurred. *Id*.

Right wrist and hand

Dr. Kassman questioned whether the right wrist fracture had properly healed or had become a non-union fracture. *Id.* at 5. Upon examination, Dr. Kassman found Claimant had a weak right-hand grip. *Id.* at 4. Claimant reported pain at the base of the right thumb, numbness in that thumb, and numbness in the right index and middle digits. *Id.* Because the x-ray and MRI of the right wrist were taken while the cast was still on, they lacked the necessary detail for Dr. Kassman to make a full diagnosis. *Id.* at 5. He recommended repeat radiographs focused on detecting occult non-union fractures in the right wrist (*Id.* at 5-6), and EMG and nerve conduction studies to rule out post-traumatic carpal tunnel syndrome caused by the accident (*Id.* at 5).

Dr. Kassman concluded that because he had incomplete medical records and further testing was also needed, he could not form a full diagnosis or determine whether Claimant had attained maximal medical improvement. *Id.* at 5.

Dr. Glenn R. Bair

[5] Dr. Kassman reviewed the following medical records of Claimant's treatment: radiographs from both hospitals in Kuwait; records from Banner Thunderbird Hospital where Claimant was treated upon his return to the United States (physical history and examination; orthopedic, x-ray and MRI reports for both the right wrist and left ankle); and an ultrasound at Banner Thunderbird which ruled out Deep Vein Thrombosis (deep vein blood clotting).

Dr. Bair, Employer's orthopedic expert, saw Claimant on August 1, 2006 and issued the IME report on that same date. EX 25A at 1.

Right upper extremity and neck

Dr. Bair noted Claimant received two cervical surgeries, "for right arm symptoms," by Dr. David Barranco at Good Samaritan Hospital in 1991 and 1992. Claimant reported that these symptoms abated after the second surgery. *Id.* at 1. Dr. Bair stated Claimant's report of symptoms in the right upper extremity and the neck is consistent with his cervical spine condition as well as with a possible carpal tunnel syndrome. *Id.* at 3. Dr. Bair added that the carpal tunnel would be unrelated to the accident. *Id.* He reviewed results of an MRI of the cervical spine dated January 23, 2006. *Id.* at 2. He stated that Dr. Robert Ortega, who completed the MRI, diagnosed Claimant with significant degenerative disk disease with associated stenoses throughout the cervical spine, particularly at the C6-7 level. *Id.*; CX 13 at 2 (Dr. Ortega's report). Dr. Bair took x-rays of Claimant's cervical spine and noted some disc degeneration at the C4-5, 5-6, and 6-7 levels. *Id.* at 2.

Claimant told Dr. Bair the numbness in his right hand had recently expanded from the first three digits to all five. *Id.* at 1-2. Dr. Bair took several x-rays of the right wrist which showed minimal degenerative changes. *Id.* He also reviewed a report by Dr. Avinash Khatter of prior EMG and nerve conduction studies of the sensory and motor nerves in both upper extremities. EX 25A at 2; CX 10 (Dr. Khatter's report, 11/11/05). Dr. Bair quoted Dr. Khatter's diagnostic impressions in full: "1) Mild right median neuropathy likely in the forearm (pronator teres syndrome). 2) No evidence of radiculopathy." EX 25A at 2; CX 10 at 2. After reviewing this and other medical records, Dr. Bair indicated his diagnostic impression that carpal tunnel syndrome remains a rule-out. EX 25A at 3.

Although Dr. Bair voiced general agreement with Dr. Kassman's assessment, he did not directly comment on whether he concurred with Dr. Kassman on the recommendation of radiographs focused on detecting occult non-union fractures. EX 25A at 3; CX 8 at 5-6. However, Dr. Bair took x-rays of the both wrists paying particular attention to the scaphoid on the right and found no fractures. EX 25A at 2.

Knees and ankles

Claimant reported to Dr. Bair that his knees pop and that he cannot ascend stairs due to pain and lack of mobility in his both his knees and ankles. *Id.* at 1-2. Concerning the left ankle, Dr. Bair noted that it "does give away." *Id.* at 2. Dr. Bair took x-rays of Claimant's knees and ankles and reported the knees showed some mild degeneration. *Id.* Dr. Bair stated the x-rays he took of both ankles indicated no fractures that were obvious. *Id.*

In conclusion, Dr. Bair stated that he had insufficient medical records with which to form a full diagnosis.[6] *Id.* at 3-4. Concerning whether Claimant could return to work, he stated: "Clearly, despite all of his complaints, he's been capable of performing some type of work for some time and it's difficult to generate any description of permanency based on the available information." *Id.* at 3. He withheld further comment until more medical records were made available. *Id.* at 4.

Dr. J. Michael Powers

[6] Dr. Bair reviewed the following medical records of Claimant's treatment: an MRI of the cervical spine (CX 13, 1/23/06); EMG and nerve conduction studies (CX 10, 11/1/05); Dr. Kassman's report (CX 8, 9/15/05).

Dr. Powers, a neurologist, saw Claimant on August 4, 2006 and issued the IME report on that same date.[7] Dr. Powers made note of Claimant's cervical spine problem and diagnosed neurological conditions in the right upper extremity and the lower extremities, but stated he found no evidence that the accident caused neurological injuries. EX 25B at 6, 7.

Right upper extremity

Claimant, who is right-handed, described to Dr. Powers a number of problems with the right arm, hand, and wrist that have emerged since the accident. *Id*. at 1, 2, 4. These include pain in the right wrist, difficulty with gripping, reduced sensation on the back of the hand and numbness in the right thumb, index and middle fingers that more recently extended in January 2006 to all five digits. *Id.* at 1, 4. Claimant described muscle weakness extending from the right hand and arm up to his shoulder, and numbness in the right forearm to the mid-arm. *Id.* at 2. No atrophy was noted on physical examination. *Id.* at 4. Claimant also reported to Dr. Powers that the difficulties with his right arm and hand increase with use and that he is on medication for the pain. *Id.* Dr. Powers conducted physical examination tests of the hands, arms and wrists. *Id.* at 4. Testing confirmed a much weaker grip in the right hand than the left. *Id.* As for numbness, Dr. Powers stated that Claimant reported near anesthesia when a toothpick was applied to the thumb, index and middle fingers, and reduced sensation in the fourth and fifth digits. *Id.*

Dr. Powers reviewed the EMG and nerve conduction test results of Dr. Khatter. *Id.* at 6; CX 10. In addition, Dr. Powers completed EMG and nerve conduction studies of the sensory and motor nerves in both upper extremities for comparison with Dr. Khatter's testing. EX 25B at 4-5, 6, 7. Although Dr. Powers did not report significant variation between the results of the two tests, he disagreed with Dr. Khatter's impression that Claimant likely suffers from pronator teres syndrome. *Id.* at 6. He ruled this out along with any current carpal tunnel syndrome or cervical radiculopathy. *Id.* He stated that although both his and Dr. Khatter's nerve conduction studies indicated a slow response in the right arm's median motor nerve (*Id* at 7; CX 10 at 2), such a result probably does not indicate pronator teres syndrome and is "more consistent with an underlying sensory polyneuropathy." EX 25B at 7. At another point he stated, without elaborating further: "In my opinion, the pattern of weakness and sensory loss which is described is largely nonphysiologic." *Id.* at 7. At still another point Dr. Powers stated his impression that Claimant's report of numbness in the fingers in his right hand is "greatly amplified" in comparison to the results from the EMG and nerve conduction studies but did not indicate whether he found this to be due to physiological or non-physiological phenomena. *Id.* at 8. Dr. Powers concluded that he found no evidence of a connection between Claimant's cervical spine condition and the numbness in Claimant's fingers. *Id.* at 6.

Neck

When asked by Dr. Powers to move his neck, Claimant stated this increased the pain in his right arm. *Id.* Claimant also reported crepitation (crackling and popping) with neck movement in multiple directions. *Id.* at 2, 4. Dr. Powers noted x-rays and an MRI of the cervical spine indicated chronic degenerative changes in the neck. *Id.* at 6, 7; CX 13. Claimant reported that prior to the second cervical spine operation in 1991, he experienced neck pain that radiated into the right arm. EX 25B at 2. Dr.

[7] Dr. Powers reviewed the following medical records: emergency treatment at New Mowasat Hospital (CX 1); Dr. Epstein's assessment of Claimant's concussion; records from Banner Thunderbird Hospital where Claimant was treated upon his return to the United States (a CT scan of the brain; x-ray and MRI reports concerning the right wrist and left ankle); handwritten progress notes from physical therapy (EX M1 at 2-3); Dr. Zachary's progress notes (EX 24); a report of EMG and nerve conduction studies (EX 10, 11/1/05); and Dr. Kassman's report (CX 8, 9/15/05); and an MRI of the cervical spine (CX 13, 1/23/06).

Powers stated that he found Claimant's cervical spine condition had no connection to the accident but did not expand on this. *Id.* at 7.

Memory problems and headaches

Claimant reported daily headaches and short-term memory problems and admitted to experiencing some dizziness. *Id.* at 2, 3. Dr. Powers noted the impression that Claimant minimized his problems with dizziness. *Id.* at 3. Concerning short-term memory, when asked by Dr. Powers to remember three words, Claimant remembered two of them after a few minutes passed. *Id.* at 3. He told Dr. Powers that shortly after the accident he saw a neurologist, Dr. Epstein, who told him that memory problems were normal shortly after an accident. *Id.* at 3, 7; CX 14 at 47. Dr. Powers reviewed Dr. Epstein's report from November 4, 2004 which set forth a diagnosis of concussion with a moderate loss of consciousness. EX 25B at 5, 7. When asked, Claimant did not recall ever receiving an MRI scan of the brain. *Id*. at 3.

Left ankle, feet and knees

Dr. Powers noted Claimant's left ankle twists in. *Id.* at 2. Claimant described pain and popping in his left ankle and foot that occur with movement. *Id.* Dr. Powers conducted sensory tests of the lower extremities, including vibration tests. Claimant reported he could not feel vibrations in the toes of either foot. *Id.* Dr. Powers noted an impression of neuropathy in the lower extremities accompanied by sensory loss and reduced reflexes. *Id.* at 7.

CONCLUSIONS OF LAW

The Act is construed liberally in favor of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J. B. Vozzolo, Inc. v. Britton,* 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the true-doubt rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3d Cir. 1993). In arriving at a decision in this matter, it is well settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners or other expert witness. *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel,* 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce,* 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.,* 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

Causation

Section 20(a) of the Act creates an initial, rebuttable presumption that a claimant's disabling condition is causally related to his employment. 33 U.S.C. §920(a); *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 64 (2d Cir. 2001). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and the harm, and only must establish that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Id.* at 64-65. Under the aggravation rule, an entire disability is compensable if a work-related injury aggravates, accelerates, or combines with a prior condition. *Meyer v. Service Employers International, Inc.*, 40 BRBS 44 (2006).

For the following reasons, Claimant's evidence establishes a prima facie claim. Claimant reported his ailments in the days and weeks after the initial emergency treatment. In the first few months following the accident, Claimant reported to his physicians pain and mobility problems in the left ankle, stiffness and mobility problems in the right wrist, hand and fingers, numbing and tingling in the fingers of the right hand, neck pain, and memory problems. EX 24A at 1; CX 14 at 11, 16 at 3; EX 25B at 5, 7; CX 14 at 47, TR 134-37, 172. Nearly all of these are located in areas of the body that were seriously injured in the accident. The symptoms in the neck and right upper extremity are uncannily similar to the cervical spine symptoms Claimant previously experienced until the surgery in 1991. The absence of these symptoms for thirteen years and their immediate emergence after the accident leads to the inference that the accident aggravated the prior cervical spine condition. Dr. Bair, Employer's orthopedic expert, found these symptoms to be consistent with the prior cervical spine problems. EX 25A at 3. When Claimant initially reported the neck pain shortly after the accident in November 2004, it was diagnosed by Dr. Kleven as a symptom of the cervical spine condition. CX 14 at 11; CX 16 at 3. Thus I find that Claimant's evidence invokes the Section 20(a) presumption linking his injuries to the accident.

An employer may break the presumptive link with substantive evidence that severs the presumed causal connection between the injury and Claimant's employment. *American Stevedoring Ltd.*, 248 F.3d at 65. To break the causal link between the accident and aggravation of a prior condition, the employer must provide substantial evidence that the accident neither caused nor aggravated the condition. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 689 (5th Cir. 1999). If the employer meets that burden, then the presumption falls out of the case and the issue of causation must be resolved based on the evidence as a whole. *American Stevedoring Ltd.*, 248 F.3d at 65. In that event, all relevant evidence is weighed to determine if a causal relationship has been established, with the claimant bearing the ultimate burden of persuasion by a preponderance of the evidence. *Id.*; *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280, 28 BRBS 43(CRT) (1994).

Employer's medical experts do not provide substantial evidence to break the causal link regarding the following ailments: left ankle pain; difficulty walking and ascending stairs; popping and pain in Claimant's knees; headaches, dizziness, and short-term memory problems. Thus I find that as to these ailments, the presumption of causation remains intact.

As for causation regarding Claimant's symptoms in the neck and in the right upper extremity, Employer's neurological expert, Dr. Powers, presents three possibilities, including non-physiological causes, polyneuropathy, and disc degeneration.

Dr. Powers claims that the pattern of weakness and sensory loss in the right upper extremity "is largely nonphysiologic." EX 25B at 7. It is unclear what Dr. Powers means by "nonphysiologic." Although at another point he stated Claimant's report of numbness in his right fingers was "greatly amplified" in comparison to the results from the EMG and nerve conduction studies, he does not indicate whether the amplification stems from physiological or non-physiological phenomena. In addition, no report or medical record in evidence indicates Claimant is malingering or suffering from psychosomatic symptoms. Although Dr. Kassman noted that shortly after the accident one physician made a notation that Claimant's complaints seemed out of proportion with physical exam findings, those complaints pertained to documented injuries for which Claimant received urgent care at the time. EX 8 at 2. Therefore, I find Employer does not present substantial evidence that the right upper extremity numbness and weakness is largely non-physiologic, and this statement by Dr. Powers is an inadequate basis to rebut the link between the injuries and the accident.

Dr. Powers also proposes physiological reasons unrelated to the accident for Claimant's symptoms in the neck and right upper extremity. He opined that the results of the EMG and nerve conduction studies, which included a slow response in the median motor nerve of the right arm, were

consistent with non-posttraumatic sensory polyneuropathy. EX 25B at 7. In addition, he reviewed x-rays and an MRI of Claimant's cervical spine and concluded the cervical problems originate from degenerative disk disease and are unrelated to the accident. EXB at 7. Because Dr. Powers' opinion is that non-work related illnesses caused the symptoms in the right upper extremity and the neck, Employer provides substantial evidence to sever the presumptive link. Consequently, I find that the presumption of causation falls out of the case as to the symptoms in the neck (pain and crepitation) and right upper extremity (numbness, pain, and weakness). The issue of causation as to these ailments must be resolved based upon the evidence as a whole.

Evidence as a whole

Claimant contends that the accident caused a recurrence of symptoms in his neck and right upper extremity that he had not experienced since the cervical spine surgery in 1991. Employer questions whether Claimant actually has continued to experience these ailments to the extent that he reported, apparently calling Claimant's credibility into question. Employer's Post-Hearing Brief at 3. In addition, one of Employer's medical experts, Dr. Powers, opined that Claimant's cervical condition and neurological problems are not work related. EX 25B at 7.

Employer in its post-hearing brief characterizes Claimant's medical complaints "numerous and seemingly constant," emphasizing Claimant discontinued treatment with his physical therapist and his orthopedist in early 2005 and at that time planned to return to work. Employer's Post-hearing Brief at 3. Employer appears to be questioning the credibility of Claimant's testimony that his symptoms remain debilitating. However, the evidence that Employer cites does not raise credibility concerns. For example, Employer contends that Claimant discontinued treatment with his physical therapist and his orthopedist in early 2005 because Claimant no longer needed treatment at that point. However, Claimant dropped out of treatment in April 2005 contrary to medical recommendation because Employer failed to provide worker's compensation insurance and did not pay the medical claims. TR at 155-56; EX M1 at 2-3; EX 24A at 5.

Employer also emphasizes that on April 5, 2005 Dr. Zachary noted a reduction in symptoms and approved Claimant's request to return to work. *Id.* Employer argues that this event would be consistent with Claimant being able to work, as opposed to Claimant testimony that he suffers from ongoing debilitating symptoms. However, medical clearance to return to work in April 2005 does not support Employer's theory that Claimant continued on the same trajectory of progress after that appointment. Dr. Zachary noted the possibility of relapse of symptoms and recommended Claimant return to see him as needed. *Id.* Dr. Zachary attributed Claimant's symptom reduction to physical therapy. *Id.* The physical therapist recommended that the therapy continue. EX M1 at 2-3. After Claimant discharged from treatment with Dr. Zachary and with his physical therapist contrary to their recommendations, it is not surprising that Claimant's symptoms returned to such a level that he was unable to follow through with his desire to return to work. Employer seems to be putting Claimant in a double bind by failing to pay medical claims, and then questioning Claimant's subsequent report of debilitating symptoms after treatment ended due to lack of medical coverage.

Additionally, Employer claims Claimant's credibility is called into question because he applied for overseas positions subsequent to the accident. Employer's Post-Hearing Brief at 3. However, attempts by Claimant to return to work do not necessarily imply he is asymptomatic and fabricating his ailments; such attempts would also be consistent with Claimant approaching his compensation claim in good faith. At the hearing, when asked on cross to explain why he is pursuing work while continuing to report debilitating symptoms, Claimant presented a plausible explanation. He stated that the application process for overseas procurement jobs can take several months, and by the time he might receive a job offer, he hoped his symptoms would be ideally at a level that would allow him to accept the offer. TR at

213, 229. Thus I find Employer provides no evidence to successfully challenge the credibility of Claimant's testimony regarding his symptoms.

Employer also presents medical evidence in support of non-work related causes for the Claimant's symptoms in his neck and right upper extremity. One of Employer's medical experts, Dr. Powers, directly addressed causation in his opinion. His report which was confined to neurological disorders is far from credible. He stated that from a neurological point of view Claimant requires no further treatment in relation to any injuries from the accident and opined that there exists no connection between the accident and the symptoms in the neck and right upper extremity, or even any connection among those symptoms.[8] *Id.* at 7-8. He also claimed the existence of an amorphous, separate and largely non-physiological reason for weakness and numbness in the right arm. *Id.* at 7-8.

I accord no weight to Dr. Powers' bald assertions of discrete non-work related causes for each of Claimant's symptoms in his neck and right upper extremity. He claims that a non-work related polyneuropathy caused the slow motor nerve response in the right arm and also vaguely referred to a separate, non-physiological basis for the numbness and weakness in the right arm but provided no further explanation or evidence. He confined his opinion to neurological disorders but then commented on the cervical spine condition as categorically unrelated to the accident. But common sense and experience indicate that it would not be unusual for neck pain to emerge after the accident. Claimant's vehicle, moving at 120 kilometers per hour (74.6 miles per hour), was hit from behind, careened off the highway and hit an abutting wall head-on. Claimant was rendered unconscious from the accident on September 23, 2004 and remained unconscious for an unknown period of time. He was treated for a concussion, lacerations and fractures, received 24-hour care for nearly the entire month of October, and subsequently was discharged in a wheelchair. Thus Claimant's reports of neck pain and right upper extremity difficulties emerged relatively quickly once he became slightly more mobile in November and December 2004. It is uncontroverted that Claimant had no current medical conditions other than high cholesterol at the time of the required physical in April 2004 (TR at 83; CX 16 at 27) and that the symptoms in question had not occurred since the surgery in 1991. TR at 166, 172, 177; CX 8 at 3-4; EX 25A at 1; EX 25B at 2. It strains the imagination to consider the alternative web of explanations set forth by Dr. Powers. His opinion leads to the absurd conclusion that the neck pain, the slowed right-arm motor nerve response, and the pattern of right-arm numbness and weakness sprung forth, each stemming from discrete and unrelated conditions, by mere coincidence shortly after the accident. Thus I accord no credibility to Dr. Powers' opinion. The medical evidence reviewed clearly indicates that the accident either caused or aggravated the symptoms in the neck and right upper extremity.

Dr. Bair, Employer's orthopedic expert, stated that Claimant's symptoms in his neck and right upper extremity were consistent with the cervical spine condition as well as with carpal tunnel syndrome, the latter of which he thought was unrelated to the accident. EX 25A at 3. Similarly, Dr. Kassman, Claimant's orthopedic expert, stated in his report that Claimant has suffered from multiple residual complaints following the accident. CX 8 at 5. Dr. Bair reviewed Dr. Kassman's report and stated he has "no real disagreement" with the conclusions of Dr. Kassman. EX 25A at 3. Both physicians stated they needed more evidence to draw full diagnostic conclusions. *Id.*; CX at 5.

Claimant's treating physician, however, did form a diagnostic conclusion as to the neck pain. Dr. Kleven diagnosed Claimant with chronic neck pain status post cervical fusion on November 4, 2004. CX 14 at 11; CX 16 at 3. Claimant also experienced symptoms shortly after the accident in the right upper

[8] Concerning orthopedic concerns, Dr. Powers stated that he defers to orthopedic experts. While he claimed the symptoms of the right upper extremity to be unrelated to the cervical spine condition, he discussed no evidence to support this, whereas Dr. Bair, Employer's orthopedic expert, found the symptoms of the right upper extremity to be related to the cervical spine condition. EX 25A at 3.

extremity, including numbness, tingling, stiffness and mobility problems in the right wrist, hand and fingers. TR 172; EX 24A at 1. In December 2004, Dr. Kleven referred Claimant to orthopedist Dr. Zachary who treated Claimant for these problems. EX 24A at 1. Currently, Claimant continues to experience neck pain as well as pain, numbing and mobility problems in his right upper extremity. This evidence, particularly in light of the thirteen-year hiatus from these symptoms and their return after the accident, provides more than adequate support for the claim that the accident caused or aggravated these symptoms.

Based upon the record as a whole I am convinced that the accident on September 23, 2004 either caused or aggravated the symptoms in Claimant's neck and right upper extremity, thereby preventing him from working in his position in contract procurement and administration. In reaching this decision, I have considered all evidence, including the Independent Medical Examinations, medical progress notes, and Claimant's testimony.

Nature and Extent of the Disability

Claimant has the initial burden to establish the nature and extent of his disability. *Trask v. Lockheed Shipbuilding and Construction Co.,* 17 BRBS 56, 59 (1985). An injured worker's disability becomes permanent when the injury or condition reaches the point of "maximum medical improvement" ("MMI"). *James v. Pate Stevedoring Co.,* 22 BRBS 271, 275 (1989). Conversely, any disability shown prior to the point of MMI is considered temporary in nature. *Id*. The medical evidence in support of MMI must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask*, 17 BRBS at 60.

In his report on September 15, 2005, orthopedist Dr. Kassman stated that without further medical testing he could not determine whether Claimant had reached MMI. CX 8 at 5. Nearly a year later, orthopedist Dr. Bair wrote that he had no disagreements with Dr. Kassman's opinion and indicated that "it's difficult to generate any description of permanency based on the available information." EX 25A at 3. Dr. Powers' opinion does not address MMI and defers to orthopedic specialists as to any impairments they may find. EX 25B at 8. Therefore, none of the IME reports express the opinion that Claimant has reached MMI.

However, Employer contends that Claimant reached MMI no later than the last date that orthopedist Dr. Zachary saw Claimant, on April 5, 2005. Employer cites Dr. Zachary's notes indicating that he did not anticipate Claimant would suffer permanent impairment from his injuries. Employer's Post-Hearing Brief at 2-3, citing EX 24A at 5. I find this statement to be merely a prognosis as to permanency of impairment, near-identical to a similarly speculative statement by Dr. Bair. EX 24A at 3 ("In general, I believe all of these would heal without permanent impairment"). Dr. Kassman saw Claimant five months after the last appointment with Dr. Zachary; Dr. Bair saw Claimant more than a year later. Each reviewed medical records and declined to determine whether MMI had been reached, emphasizing the need for further medical data. EX 25A at 3; CX 8 at 5; *see also* FN 5, 6, *supra*.

After Claimant discontinued with Dr. Zachary, treatment was sporadic. Claimant sought Medicare coverage which he eventually obtained but he has encountered several problems with that coverage. TR at 186-87. As a result, Claimant has yet to receive several recommended diagnostic tests as well as consistent treatment. TR 183, 186-88; CX 8 at 6; EX M1 at 2-3.

Based on Claimant's testimony and on the reports from Dr. Zachary, Dr. Kassman and Dr. Bair, I conclude that Claimant has not been able to access needed medical testing and treatment that could help him to attain maximum medical improvement. As noted previously, Employer, by its obvious attempts to evade its responsibility for Claimant's medical treatment, is primarily responsible for this lack of medical

treatment and testing and cannot now be allowed to profit further from its shirking of its duty by its contention that Claimant didn't need further medical care rather than the true situation which is that claimant was denied proper medical treatment by the inaction of Employer. Therefore, I find that Claimant has not reached MMI and his disability has therefore remained temporary since the date of the accident.

The extent of a claimant's disability is determined by his ability to work. *Manigault v. Stevens Shipping Co*., 22 BRBS 332, 333 (1989). If the claimant establishes that he is unable to perform his usual employment because of a work-related injury, he is considered totally disabled. *Id.* At that point, the burden shifts to the employer to prove the availability of suitable alternate employment. *Trask v. Lockheed Shipbuilding and Construction Co.,* 17 BRBS 56, 59 (1985). If an employer fails to establish that the claimant is capable of performing suitable alternate employment or that suitable alternate employment is available, the claimant is entitled to total disability benefits. *Id.*

For the following reasons, I find that it would not be possible for Claimant to perform his usual job functions at his current level of symptoms. Claimant is right-handed and a great deal of his symptoms reside in his right hand, wrist, and arm, including difficulty gripping with his right hand (Claimant is right-handed); wrist mobility problems; pain and numbness in his right hand, arm and fingers. CX 8 at 3-4; EX 24A at 1-2, 4; EX 25A at 1-2; EX 25B at 1-4. His right hand and arm would be used extensively in his overseas contract administration work, a job that he testified requires 12- to 13-hour days, six days a week at minimum. TR at 75. In addition, depending on the situation he may need to move from job site to job site, which could be difficult given the current difficulties with walking and ascending stairs, bearing weight on the left ankle, and neck pain and crepitation. *Id.* at 171-72, 176-78; CX 8 at 3-4; CX 16 at 3; EX 24A at 1-2, 4; EX 25A at 1-2; EX 25B at 1-4. He testified that he cannot walk or move his right wrist without pain medication. TR at 172. Thus I find that Claimant's current symptom levels would prevent him from performing his usual job of overseas contract procurement and administration.

Because Claimant met the burden of establishing that he is unable to perform his usual employment because of his injuries, the burden shifts to Employer to prove Claimant is capable of working in suitable alternative employment. *Trask v. Lockheed Shipbuilding and Construction Co.,* 17 BRBS 56, 59 (1985). Such employment must consist of realistic job opportunities that a claimant is capable of performing and could secure with diligence. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981). To demonstrate that a job opportunity is realistic, an employer must submit into evidence the exact nature, terms and availability of the alternative employment. *Thompson v. Lockheed Shipbuilding and Construction Co.*, 21 BRBS 94, 97 (1988).

Employer however, fails to provide any evidence of suitable alternative employment. No doctor has completed a specific assessment of Claimant concerning his ability to return to work since Dr. Zachary's assessment in April 2005 when physical therapy had reduced Claimant's symptoms. EX 24A at 5. Dr. Bair's report from August 2006, which is the only other evidence that discusses the possibility of a return to work, lacks specificity as to what kinds of tasks Claimant would be capable of performing: "Clearly, despite all of his complaints, he's been capable of performing some type of work for some time and it's difficult to generate any description of permanency based on the available information. Further comments are withheld until further medical records or x-rays are provided." *Id.* at 3-4. Because Employer does not establish that Claimant is capable of performing suitable alternate employment or that suitable alternate employment is available, I find Claimant is entitled to total disability benefits. Therefore, based on the record as a whole, I find that Claimant has a temporary, total disability that began as of the date of the accident, September 23, 2004, and continues to the present.

Average Weekly Wage

Normally, when a claimant works "substantially the whole of the year" preceding the accident, those wages are used for the average weekly wage ("AWW") calculation. 33 U.S.C. § 910(a); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 609 (1st Cir. 2004). Where evidence indicates a claimant has not worked substantially all of the previous year, evidence may be utilized as to the wages earned by other employees in the same or similar employment. 33 U.S.C. § 910(b); *Bath Iron Works Corp.*, 380 F.3d at 609. However, where the record lacks evidence of a claimant's wages from the prior work year, as well as evidence as to comparable wages, Section 10(c) of the Act applies. 33 U.S.C. § 910(c). In that event, available information is utilized to arrive at a sum that reasonably represents the claimant's annual earning capacity at the time of the injury. *Id.*; *Bath Iron Works Corp.*, 380 F.3d at 609-10; *Meehan Seaway Service Co. v. Director, OWCP*, 125 F.3d 1163, 1169 (8th Cir.1997). When the prior year's wages are unavailable, the actual earnings of the claimant at the time of the injury may be utilized for the calculation if those earnings reasonably approximate that claimant's annual earning capacity. *Dangerfield v. Todd Pacific Shipyards Corp.,* 22 BRBS 104 (1989).

Claimant testified that his contract with his previous employer ran for six months and ended shortly before he started work for Employer. TR at 83; 143. He also stated he worked overseas for the three years preceding the accident; each contract lasted from four to twelve months. *Id*. at 64-67. The evidence includes a lower-paying offer from April 2004 that Claimant declined (CX 16 at 28), but the record does not indicate what Claimant's actual wages were from his previous employers in the year prior to the accident. Thus I find that although Claimant was employed for substantially most of the year preceding the accident, there is no evidence of his actual earnings, or a comparable employee's earnings, for that year. Therefore, Sections 10(a) and 10(b) of the Act cannot be used to calculate the average weekly wage; instead, Section 10(c) must be applied to determine a sum that reasonably represents the claimant's annual earning capacity at the time of the injury.

The evidence as to Claimant's wages includes the contract between Claimant and Employer, and the testimony of Claimant and that of Employer's president, Dan Perini. EX 10; TR at 69, 286. Claimant testified that he worked for various defense contractors in Iraq and Kuwait from October 2001 until the time of the accident. *Id*. at 64-67. He also testified that each of these positions were also in contract procurement, with duties very similar to those in his work for Employer. *Id.* Thus I find that under Section 10(c) of the Act, it is fair and reasonable to conclude that Claimant's average weekly wage with Employer is representative of his wage earning capacity for the year preceding the accident.

Evidence of hourly wages from Employer

A determination of an employee's annual earnings must be based on substantial evidence. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991). A claimant's testimony may be considered substantial evidence. *Carle v. Georgetown Shipbuilders*, 14 BRBS 45, 51 (1980); *Smith v. Terminal Stevedores*, 11 BRBS 635, 638 (1979).

Employer and Claimant agreed upon an hourly contract rate of $60.00 an hour. EX 10. Claimant testified that he worked approximately 82-84 hours per week. TR at 75.[9] Employer argues that the average weekly wage should be set at the maximum rate for that time, $1,030.78, rather than the $5,040.00 per week that Claimant argues should be the average weekly wage. *Id.* at 69. Employer's president, Dan Perini was fairly vague. He testified that Claimant worked more than 60 hours a week "at times," but provided no further details. *Id.* at 286. Employer's attorney agreed at the hearing to submit

[9] Claimant testified that commonly he worked seven days a week for 12 hours (84 hours) and alternatively six days a week for thirteen hours a day with the seventh day being a four-hour day (82 hours). TR at 75.

Employer's record of the 2004 W-2 form for Claimant, for the purpose of wage calculations. *Id.* at 76. However, Employer did not do so. Therefore, I adopt the hourly rate of $60.00 from the employment contract (EX 10) and multiply it by 83 hours, the average number of hours Claimant testified he worked per week (TR at 75), to arrive at a figure of $4,980.00 per week for the hourly wages portion of the AWW.[10]

Additives received as part of employment

Claimant contends that the additives he received above his hourly contract rate should be included in his average weekly wage. Claimant testified he and Employer understood the additives were part of his overall compensation, including the following additives from Perini Corporation: per diem cash compensation; an apartment with free meals as well as a free maid service; and a car. He also testified that he was offered health insurance premiums and a rest and relaxation benefit by Employer as part of his contract. TR at 69, 74, 77-81, 148.

Section 2(13) of the Act states that wages are defined as the money rate at which the employee is compensated under the contract of hire in force at the time of the injury, including the reasonable value of any advantage received from the employer. 33 U.S.C. § 902(13); *Story v. Navy Exchange Service Center*, 30 BRBS 225 (1994), aff'd on recon., 33 BRBS 111 (1999). Specifically excluded are employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other benefit plan. *Id.* Included in wages are overseas additives, because they stem from the employment, are ascertainable, and are a part of the compensation scheme prior to the injury. *Denton v. Northrop Corp.*, 21 BRBS 37, 46-47 (1988); *Rayner v. Maritime Terminals*, 22 BRBS 5, 9 (1988). Additives that flow indirectly from the employer to the employee may be included if the additive was contemplated at the time of contract. *Story v. Navy Exchange Service Center*, 30 BRBS 225 (1994), aff'd on recon., 33 BRBS 111 (1999) (tips that the claimant received are included in the average weekly wage); *McMennamy v. Young & Co.,* 21 BRBS 351, 354 (1988) (guaranteed annual income payments from a group fund are included); *Rayner v. Maritime Terminals*, 22 BRBS 5, 9 (1988) (same).

Claimant testified that he received payments in U.S. and Kuwaiti currency from Perini Corporation, in the amount of $80-90.00 a day to cover meals, laundry and other incidentals, in addition to his hourly wages. TR at 69, 77-81. Claimant contends that the average weekly wage should include this per diem rate in addition to his hourly wages. According to Claimant testimony, Perini paid its subcontractor, Employer, a lower contract price but paid additives to Claimant. *Id*. at 69, 78-79. Claimant characterized this as a common practice among federal contractors, stated that he had similar arrangements with prior employers, and that he and Employer expected Perini would provide a per diem and other additives. *Id.* at 69, 78-79, 81. Employer provided no rebuttal. I find that at the time Employer hired Claimant, the parties contemplated that the compensation would include additives from Perini Corporation.

As to the amount of compensation, I find Claimant's testimony to be credible. No evidence was submitted in rebuttal by Employer. Therefore, I find the $80-90.00 per diem that Claimant received to be a readily ascertainable advantage, provided indirectly by Employer to Claimant and contemplated by the parties at the time of hiring. Claimant testified that he worked six to seven days a week. *Id.* at 69. In the absence of any rebuttal from Employer, the per diem is calculated at $85.00 per day for 6.5 days per week, arriving at the amount of $553.00 per week to be included as part of the AWW.

[10] Claimant apparently contends that his weekly wage should be $5,040.00 to include a rest and relaxation benefit that Employer would have provided him under contract had he not been in the accident. TR at 73-74. But as discussed below, the average weekly wage cannot include a benefit yet to be taken at the time of injury.

Claimant also testified that he was provided an apartment, meals, maid service and a car by Perini. *Id.* at 79, 81. He was to receive a rest and relaxation benefit from Employer as well. *Id.* at 74. Claimant seeks to include the value of these additives to his weekly wage amount as well. However, I find none of these can be included in Claimant's wage amount. In calculating the average weekly wage, the value of free room and board cannot be included in addition to the per diem because to find otherwise results in double recovery. *Roberts v. Custom Ship Interiors*, 35 BRBS 65 (2001), aff'd, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), cert. denied, 537 U.S. 1188 (2003). Thus I find that the apartment and meals provided to Claimant cannot be included in the average weekly wage.

The use of the car and of an in-home maid service also cannot be included in the wage calculation. In order for compensation to be included as part of a claimant's wages, the value must be readily calculable. *Denton v. Northrop Corp.*, 21 BRBS 37, 46-47 (1988). No evidence suggests what the value in Kuwait of either service might be. I find that neither the value of the use of a car, or of the maid service, is readily ascertainable and thus cannot be considered part of Claimant's wages.

Claimant contends Employer offered as part of the employment contract payment of one-half of Claimant's premiums for insurance coverage obtained through a previous employer ("COBRA coverage"). TR at 148; CX 16 at 1, 2. However, health insurance benefits are specifically excluded from wage compensation. *Story v. Navy Exchange Service Center*, 30 BRBS 225 (1994), aff'd on recon., 33 BRBS 111 (1999). Therefore the premiums cannot be included in the wage calculation.

As for the rest and relaxation benefit, Claimant had yet to take the benefit at the time of the accident. TR at 74. When a claimant would have received a bonus but for the work-related injury, it cannot be considered in calculating the pre-injury average weekly wage; only actual wages may be used. *Johnson v. Newport News Shipbuilding & Dry Dock Co*., 25 BRBS 340 (1992). Thus the rest and relaxation benefit is excluded from Claimant's wages.

Based on the evidence, I find that the average weekly wage shall be calculated from the combined sum of the hourly wages from Employer ($4,980.00 per week) plus the rate of the per diem additive ($553.00 per week) to arrive at the average weekly wage of $5,533.00.

Outstanding Medical Claims

Medical expenses incurred after the industrial injury may be assessed against an employer if they are reasonable and necessary. 33 U.S.C. § 907(a); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the injury. 20 C.F.R. § 702.402; *Perez v. Sea-Land Serv., Inc.,* 8 BRBS 130, 1138 (1978). Reasonable and necessary travel costs for treatment of a claimant's injuries are included in medical expenses assessed against the employer. 20 C.F.R. § 702.401(a); *Castagna v. Sears, Roebuck & Co*., 4 BRBS 558 (1976), aff'd mem., 589 F.2d 1115 (D.C. Cir. 1978). The Act provides that an employer is liable not only to a claimant's medical providers for medical claims and expenses covered under the Act but also to the claimant who may recover out-of-pocket payments for such treatment or services. 33 U.S.C. § 907(d); *Nooner v. National Steel and Shipbuilding Company*, 19 BRBS 43 (1986).

In view of the foregoing findings, Claimant is entitled to medical assessment and treatment as reasonable and necessary under Section 7 of the Act.

Employer generally accepted responsibility for the medical claims submitted by Claimant from the time of the accident until the time at which Employer contends Claimant reached MMI. TR 196, 259-60; Employer's Post Hearing Brief at 3. Employer's president, Dan Plute, testified that some medical bills have been paid but that payment of claims has been problematic due to Claimant's failure to provide adequate claims information. TR 259-60. In its post-hearing brief, Employer continued to present this

contention. Employer's Post Hearing Brief at 5. However, although Employer conceded liability in the amount of $5,362.69, the amount Employer had paid of those claims as of the close of evidence was $457.15. TR at 61, 107, 108, 192, 198, 215-16, 248-50, 256-60; EX 26-D, E, F, G, K, N, O, S, U, W. Some of Claimant's medical providers have submitted their bills to collection agencies. EX 26-N, 26-F; CX 16 at 16, 35, 36 (more than $3,000.00 in collection).

Employer contests liability of some of the medical claims as unrelated to the necessary treatment of Claimant's injuries. Employer contests liability for testing Claimant received on October 1, 2004 for Deep Vein Thrombosis ("DVT") (CX 14 at 7). Employer claims the latter testing is unrelated. EX 23-1. Claimant received the testing, however, during the initial medical assessment upon his arrival in the U.S. shortly after the accident. His physicians split the leg cast to alleviate pressure and prescribed medication, and ordered DVT testing, due to the risk of blood clotting. TR at 100, 102. Thus it appears DVT testing was part of the assessment of Claimant's injuries upon re-entry to the U.S. CX 14 at 7. Employer provides no evidence to the contrary. Therefore, I find the DVT testing to be reasonable and necessary.

Employer also contends that the following expenses are unrelated to treatment of Claimant's injuries: oversized pants to fit over orthopedic walking boots (CX 16 at 15); and extra-wide (non-prescription) shoes to allow for an ankle brace (CX 14 at 18; CX 15 at 1). However, medical services, apparatus or supply related to the treatment of a claimant's injuries are included in the medical expenses for which an Employer is liable. 33 U.S.C. § 907(a); 20 C.F.R. § 702.401; *Hall v. Service Employers International,* 39 BRBS 799 (ALJ) (December 5, 2005). I find Employer is liable for these expenses because they were necessary supplies required to accommodate the ankle brace and orthopedic boots.

Employer also contests liability for two other claims because it is unclear whether they are related to Claimant's injuries: TENS products (CX 16 at 12, 13); and stool softener (CX 16 at 10). I find these claims do not include reference to diagnosis or treatment of claimant's injuries. CX 16 at 10, 12, 13. Claimant may submit information to Employer and the District Director, such as a prescription or recommendation from a physician, in order to seek payment from Employer.

Claimant also asserts Employer owes him reimbursement of mileage for transportation to and from medical treatment. EX 16 at 38. Employer contends Claimant's mileage expenses should be denied as lacking credibility, improperly reported, and unrelated to treatment for the injuries from the accident. Employer's Post-Hearing Brief at 5. However, the information listed in the mileage report corresponds to the following medical providers and dates of service: those named by Employer's experts; those listed in Employer's evidence on medical reports and claims; and those listed in Claimant's evidence of the same. EX 24; EX 25A at 2; EX 25B at 5, 6; EX 26 C-G, I, K-W; CX 8; CX 14 at 24; CX 15. The mileage sheet submitted by Claimant contains sufficient detail to allow the reader to find the corresponding treatment in evidence. EX 16 at 38. Thus Claimant's mileage expenditures are to be reimbursed as reasonable and necessary travel costs for assessment and treatment of his injuries.

Employer also contends Claimant has submitted insufficient information for it to pay many of the remaining claims. Employer's Post-Hearing Brief at 5. Employer seems to be arguing that Claimant is responsible to provide documentation of claims denials by his insurance and that without such documentation Employer has no liability to pay the claims at issue. *Id.* At the hearing, however, Employer was informed of its responsibility to show documentation of payment or write-off of any claims for which it seeks to not be held liable. TR at 305. Employer continues to labor under the misapprehension that its liability to claimant for medical treatment as a result of his on the job accident is somehow secondary, rather than primary. However, this is not the case. Employer in this case has consistently shirked its responsibility to this claimant to furnish adequate and prompt medical treatment, apparently hoping that someone else will shoulder its responsibilities in this regard. Indeed, claimant has been forced to seek assistance through Medicare due to Employer's failure to provide care. Now,

Employer seeks to insist that Medicare, or presumably anyone else but Employer, should pay rather than Employer. I find this position untenable, if not outright reprehensible. Thus, once Claimant has submitted to Employer either a receipt or a medical claim for treatment of his injuries, Employer is responsible to pay it. Employer, not Claimant, is responsible for claims adjustment and documentation that may impact Employer's liability, including possible payment from other sources.

After reviewing the evidence pertaining to outstanding claims as well as claims and expenses paid by Claimant, I find that Employer's liability for reasonable and necessary medical treatment of Claimants injuries includes, but is not limited to, the following amounts. Employer shall promptly pay the amounts owed to Claimant. Employer also shall promptly pay the amounts owed to the following medical providers and the collection agencies unless Employer provides proof of payment to the District Director.

Outstanding Claim(s)	**Corresponding Exhibits**	**Balance owed by Employer**	
1. Medications in Kuwait	CX 14-4 to 7; CX 16-37; EX 23-1	$94.08 to Claimant	EX
2. Prescription co-pays	CX 14-37 to 43, CX 16-37; EX 23-1	$27.23 to Claimant[11]	
3. Wheelchair	CX 14-8; CX 16-7; EX 23-1	$334.85 to Claimant[12]	
4. Thumb stabilizer	CX 14-9; CX 16-11; EX 23-1	$22.46 to Claimant	
5. Dr. Mark Zachary	CX 14-12 to 14; CX 16-8, 9, 34; EX 23-1; EX 26C	$79.53 to Claimant	
6. Scottsdale Healthcare EX 26-D	CX 14-7; EX 23-1;	$381.25 to provider	Osborn
7. Emergency Prof. Svcs.	CX 14-19; EX 23-2; EX 26-E	$112.00 to provider	
8. Dr. Eric Novack EX 23-2	CX 14-21; EX 26-F; EACMC	$2,888.10 to collector	
9. Walgreens Homecare	CX 14-22; EX 23-2	$225.98 to provider[13]	
10. Banner Good Sam.	CX 14-23; EX 23-2; EX 26-V	$477.00 to provider[14]	

[11] In an apparent mathematical error, Employer omitted the co-pay Claimant paid for a refill of Ranitidine. CX 14-39 ($6.69 paid to Fry's Pharmacy on 1/11/05).

[12] Employer erred in reading Claimant's receipt as a receipt to Ginny Potter (EX 23-1), whose signature on the receipt indicated she is the medical provider's company representative.

[13] Employer claims this may be a part of the Life Care claim; however, the evidence indicates only that the referral came from Life Care, so Employer remains liable to Walgreens Homecare, Inc. EX 14-22.

[14] Employer remains liable despite claiming a write-off because it submitted no documentation by provider.

11. Hanger Prosthetics 18, 19; EX 23-2;	CX 14-29 to 32; $71.76 to Claimant	$665.03 to provider and	CX 16- EX 26-W
12. Shoes (for ankle brace)	CX 16 at 14; CX 14 at 18; EX 23-1	$59.49 to Claimant	
13. Pants (for orth. boots)	CX 16 at 15; 14 at 25; EX 23-1	$63.36 to Claimant	
14. Sun Health	CX 14-33; EX 23-2; EX 26-J	$450.00 to provider[15]	
15. West Valley EX 23-2; EX 26-S	CX 14-24; CX 16-17; $106.45 to Claimant[16]	$125.00 to provider and	
16. NovaCare Rehab.	CX 14-36; CX 16-32; EX 23-2; EX 26-K	$137.60 to provider	
17. Team Physicians	CX 14-44, 45; EX 26-N	$219.00 to collector, IMBS	
18. Banner Thunderbird	CX 14-27, 28; EX 26-I	$12,726.60 to provider[17]	
19. Dr. Jeffrey Martin	CX 14-24; EX 26-G	$375.56 to provider	
20. Dr. Michael Epstein	CX 14-47; EX 26-P	$180.00 to provider[18]	

The total current amount due in outstanding claims is $19,822.33. Of that amount, the outstanding amount due to Claimant is $859.21. The total current outstanding amount due to medical providers and collection agents is $18,963.12.

Interest and Penalties for Non-Payment of Medical Benefits

A claimant is entitled to interest on any accrued, unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.,* 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Co. v. Directors OWCP,* 594 F.2d 986 (4th Cir. 1979). Interest also should be awarded on past due medical benefits, whether payment is due to a claimant or to the medical providers. *Ion v. Duluth, Missabe and Iron Range Railway Co.*, 31 BRBS 75 (1997). Failure to timely pay medical benefits awarded shall result in additional penalties.

Accordingly, interest on the unpaid compensation and medical benefits owed by Employer should be included in the District Director's calculations of amounts due, both to Claimant and to Claimant's

[15] Employer remains liable despite claiming a write-off because it submitted no documentation by provider.
[16] Employer erred in its calculations; Claimant paid $81.45 (4/14/05) and $25.00 (2/9/06). EX 26-S at 1, 2.
[17] Employer remains liable because it has yet to submit documentation in support of its claim that the state worker's compensation fund paid $10,125.78 and the provider wrote off the remaining balance of $2,500.82. EX 26-I.
[18] Employer remains liable because it submitted no documentation in support of its claim that CIGNA insurance paid the provider. EX 26-P.

medical providers. Employer is warned that failure to timely pay within ten days of this award will result in an additional penalty.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and on the entire record, I issue the following compensation order. The specific dollar computations may be administratively calculated by the District Director.

It is therefore **ORDERED:**

1. Employer shall pay Claimant compensation for temporary total disability from September 23, 2004, and continuing, based on the average weekly wage of $5,533.00, at the applicable maximum compensation rate of $1,031.00 per week.

2. Pursuant to Section 7 of the Act, Employer shall pay all outstanding medical claims and costs related to Claimant's injuries and shall furnish all future reasonable and necessary medical treatment of the injuries.

3. Employer shall designate a medical claims contact person who will have the authority to issue guarantee of payment to medical providers, and will manage and pay the claims in an expeditious manner. This individual's detailed contact information shall be furnished in writing by Employer to Claimant and to the District Director. This will include a telephone number for providers to receive guarantee of payment and an address where claims may be sent.

4. Employer is entitled to credit for all disability and claims payments previously made.

5. Employer shall pay interest on Claimant's unpaid compensation benefits and medical benefits from the date the compensation became due until the date of actual payment at the rate prescribed under the provisions of 28 U.S.C. § 1961.

6. The District Director shall make all calculations necessary to carry out this Order.

IT IS SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge